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STATE HOUSE ANNEX

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January 18, 1983

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His Excellency, John H. Sununu
Governor of the State of New Hampshire
State House
Concord, New Hampshire 03301

Your Excellency:

You have asked me to advise you as to the propriety of certain severance payments made to employees of Governor Gallen appointed pursuant to RSA 4:12. For the reasons stated below, it is my opinion that the severance payments were legal and were within the discretion of the Governor to make.

RSA 4:12 governs the appointment of the Governor's personal staff and provides as follows:

Governor's Staff. The governor may appoint such staff, including but not limited to legal counsel, professional persons, consultants, assistants, secretaries, stenographers, and clerks, as he shall need who shall render such services as the governor may require of them. He shall fix their compensation within the limits of the appropriation made therefor, provided however that the annual compensation of the legal counsel shall not exceed nineteen thousand thirty-two dollars. The limitation placed upon the salary of the legal counsel shall not be construed to make the person filling said office an unclassified employee but he shall be in the same status as all other employees of the governor's office. (Emphasis added.)



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RSA 4:12 appointees serve at the pleasure of the Governor and cease to hold office upon expiration of the term of the Governor who appoints them. See Tice v. Thomson, 120 N.H. 313 (1980). They are not within the state classified service, their salaries and benefits are not set by the Department of Personnel, and they enjoy none of the rights of classified employees. One such right worthy of note is the right to be paid for unused annual leave upon termination of employment with the State. Similarly, the salaries of these employees are not set by statute, as is the case with unclassified employees. Rather, the compensation of such employees is solely within the discretion of the Governor, subject to the appropriation made for this purpose. The Legislature has made a general appropriation for the personnel expenses of all RSA 4:12 employees. See 1981 Laws Ch. 568. Thus, it cannot be said that the appropriation itself designates or limits the amount paid to any one employee.¹ If the Governor chooses to set a base salary with a year end bonus or severance payment, it is within his prerogative, provided he does not exceed his appropriation.

In the course of our review of this matter, we have inquired into the practice of your predecessors, because evidence of an established administrative practice is a consideration in determining the scope and meaning of a provision of a statute. While state records reflect that severance payments were made to the Governor's aides during the administrations of both of your immediate predecessors, as these records are not kept for more than 7 years, we have not found records of this practice prior to those administrations.

¹It is interesting to compare the predecessor statute to RSA 4:12 which, until 1970, provided as follows:

The governor may employ an administrative assistant who shall serve at his pleasure, shall receive such compensation as the legislature may appropriate, and shall render such services as the governor may require of him. 1950 Laws Part 3:1.

Since only one assistant was authorized and his compensation was set by the legislature, there was nothing left to the discretion of the Governor, except perhaps, the manner of payment of the sum appropriated.

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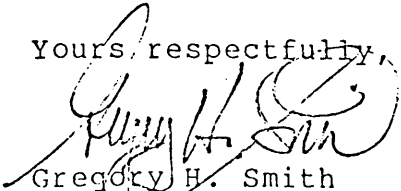
Furthermore, the statute conferring discretion on the Governor to set the compensation for his aides was first enacted in 1970 and therefore, I would not expect to find evidence that Governors engaged in this practice prior to 1970.

There is, of course, an additional consideration which Governors have quite sensibly imposed upon themselves, and for which there is no express statutory authority, and that is that any outgoing Governor will preserve for his successor at least 50 percent of the appropriation for the fiscal year in which a new Governor assumes office. In this case it is my understanding that after the severance payments, you will have been left with at least 50 percent of the appropriation for your office for personnel expenses.

Finally, you have asked about the propriety of severance payments made to RSA 4:12 employees of the Governor who remain in their positions under your administration. Designation of these payments as "severance pay" or "bonus" payments is not dispositive in determining their legality. Rather, their legality depends on the extent of the Governor's authority. Because RSA 4:12 allows the Governor broad discretion in selecting assistants and members of his staff and setting their compensation, and these payments fall within that discretion, we know of no provision of the law which prohibits them. They are not illegal.

I trust this answers your inquiry. Should you wish to discuss this matter further, I will be happy to meet with you at your convenience.

Yours respectfully,



Gregory H. Smith
Attorney General

GHS/der